86-938

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

STATE OF TENNESSEE,

Petitioner,

vs.

LAMAR FLETCHER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee At Jackson

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a sentencing proceeding to determine habitual criminality status, the trial court's jury instructions on the element of identity violated *Sandstrom v. Montana,* 442 U.S. 510 (1979), by being capable of an interpretation that the burden of proof was shifted to the defendant on that element.

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STATE OF TENNESSEE,

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vs.

LAMAR FLETCHER,

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On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Tennessee At Jackson

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Criminal Appeals of Tennessee at Jackson, not yet reported, was filed on August 13, 1986, and appears as Appendix A.

The order of the Supreme Court of Tennessee denying the petitioner discretionary review under Tenn. R. App. Proc. 11, was filed on September 29, 1986, and appears as Appendix B.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on August 13, 1986. Discretionary review was sought in the Supreme Court of Tennessee, and was denied on September 29, 1986. This petition was filed within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE

The respondent, Lamar Fletcher, was indicted and subsequently found guilty of two counts of armed robbery[1]

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[1]Tenn. Code Ann. § 39-2-501:

(a) Robbery is the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear. Every person convicted of the crime of robbery shall be imprisoned in the penitentiary not less than five (5) nor more than fifteen (15) years; provided, that if the robbery be accomplished by the use of a deadly weapon the punishment shall be death by electrocution, or the jury may commute the punishment to imprisonment for life or for any period of time not less than ten (10) years.

Provided further, that if the robbery be accomplished by the use of a deadly weapon and the robbery be of a business establishment which sells controlled substances classified in Schedules I-VI pursuant to chapter 14 of title 52, the punish-

(Continued on following page)

and of being an habitual criminal[2] as to each offense. The trial court sentenced the respondent to serve two concurrent life sentences.[3]

(Continued from previous page)

ment shall be imprisonment for life or for any time not less than ten (10) years and no person convicted of such offense shall be eligible for release classification, or parole, until such time as he has served ten (10) full calendar years of such sentence. Such offense is a Class X felony.

(b) A robbery accomplished by the use of a deadly weapon is a Class X felony.

[2]Tenn. Code Ann. § 39-1-801:

Any person who has either been three (3) times convicted within this state of felonies, not less than two (2) of which are among those specified in §§ 39-2-103, 39-605 [repealed], 39-2-111, 39-2-112, 39-2-640, 39-6-417(a)(1)(A), 40-20-112 or were for a crime punishable by death under existing law, but for which the death penalty was not inflicted, or who has been three (3) times convicted under the laws of any other state, government or country of crimes, not less than two (2) of which, if they had been committed in this state, would have been among those specified in said §§ 39-2-103, 39-605 [repealed], 39-2-111, 39-2-112, 39-2-640, 39-6-417(a)(1)(A), 40-20-112 or would have been punishable by death under existing laws, but for which the death penalty was not inflicted, shall be considered, for the purposes of this part, and is declared to be an habitual criminal, provided that petit larceny shall not be counted as one of such three (3) convictions, but is expressly excluded; and provided, further, that each of such three (3) convictions shall be for separate offenses, committed at different times, and on separate occasions.

[3]Tenn. Code Ann. § 39-1-806:

When an habitual criminal, as defined in § 39-1-801, shall commit any of the felonies therein specified or referred to, he shall, upon conviction, under presentment or indictment in form as herein provided (except where the death penalty is imposed), be sentenced as an habitual criminal, and his punishment shall be fixed at life in the penitentiary, and such offender shall not be eligible to parole, nor shall said sentence be reduced for good behavior, for other cause, or by any means, nor shall the same be suspended.

In the habitual criminal phase of the respondent's trial, the petitioner introduced records that showed a person by the same name of the respondent had previously been convicted of assault to commit murder in the first degree, murder in the second degree, receiving stolen property valued over one hundred dollars ($100.00), and five (5) separate offenses of grand larceny, said prior crimes qualifying the respondent to be characterized as an habitual criminal under Tenn. Code Ann. § 39-1-801.

The trial judge charged the jury by reading Tenn. Code Ann. § 39-1-804.[4]

On appeal, the respondent argued, *inter alia*, that Tenn. Code Ann. § 39-1-804 is unconstitutional and, alternatively, that the trial court unconstitutionally failed to give proper instructions to the jury on the nature of the "prima facie" provision of the statute.

The Tennessee Court of Criminal Appeals found that the statute is constitutional, but also held that under the principles of *State v. Merriweather*, 625 S.W.2d 256 (Tenn. 1981), and *State v. Bryant*, 585 S.W.2d 586 (Tenn. 1979), the failure of the trial court to give proper instructions as to

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[4]Tenn. Code Ann. § 39-1-804:

In all cases where a person is charged under the provisions of this chapter with being an habitual criminal, the record, or records, of prior convictions of such person upon charges constituting felonies, shall be admissible in evidence, but only as proof that such person is, in fact, an habitual criminal, as defined in § 39-1-801, and a judgment of conviction of any person in this state, or any other state, country or territory, under the same name as that by which such person is charged with the commission, or attempt at commission, of a felony under the terms of this chapter, shall be prima facie evidence that the identity of such person is the same.

the meaning and nature of the "permissive inference" established by the statute was error and remanded the case for a new hearing on the habitual criminal phase, in which the trial court would give proper instructions.

One member on the Tennessee Court of Criminal Appeals, Judge John K. Byers, dissented and, relying on *McMillan v. Pennsylvania,* — U.S. —, 106 S.Ct. 2411, (1986), concluded the State is free to allocate some burden of persuasion to the defendant in a sentencing procedure; therefore, the instruction was not unconstitutional.

The Supreme Court of Tennessee denied the petitioner's application for permission to appeal.

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REASONS FOR GRANTING THE WRIT

The Tennessee Court Of Criminal Appeals Erroneously Found That The Trial Court's Jury Instructions On Identity Violated Due Process.

The state appellate court has misapplied the holding of this Court in *Sandstrom v. Montana,* 442 U.S. 510 (1979). Therefore, this Court should grant the writ of certiorari and review the issue presented in this case.

In holding that Tenn. Code Ann. § 39-1-804 creates a permissive inference and not a mandatory presumption and that the failure of the trial court to give proper instructions as to the meaning and nature of the inference was error, the Tennessee Court of Criminal Appeals relied upon the principles enunciated in *State v. Merriweather,* 625 S.W.2d 256 (Tenn. 1981), and *State v. Bryant,* 585 S.W.2d 586 (Tenn. 1979).

In *Merriweather,* the Tennessee Supreme Court construed Tenn. Code Ann. § 39-1960 (currently § 39-3-302)[5] as creating a permissive inference. *State v. Merriweather, supra,* at 257-258. The court, relying on *State v. Bryant, supra,* held the jury instruction in a prosecution under the bad check law should include an explanation indicating to the jury the permissive nature of the inference created by the statute. *Id.,* at 258.

In *Bryant,* The Tennessee Supreme Court held that Tenn. Code Ann. § 39-2802 (currently § 39-2-704)[6] creates a permissive inference, one which allows, but does not require, the jury to infer the inferred fact from the proved fact. *Id.,* at 589. The Court expressly interpreted the statute liberally so as to sustain its constitutionality and to

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[5]Tenn. Code Ann. § 39-3-302:

As against the maker, or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence and create a presumption of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank, corporation, firm or person, provided such maker or drawer shall not have paid the holder thereof the amount due thereon within five (5) days after receiving notice that such check, draft or order has not been paid by the drawee.

[6]Tenn. Code Ann. § 39-2-704:

If any person or persons disguised or in mask, by day or by night, shall enter upon the premises of another, or demand entrance or admission into the house or inclosure of any citizen of this state, it shall be considered prima facie that his or her intention is to commit a felony, and such demand shall be deemed an assault with intent to commit a felony, and the person or persons so offending, shall, upon conviction, be punished by imprisonment in the penitentiary not less than ten (10) years nor more than twenty (20) years.

avoid the difficulty of measuring the statute against the "more likely than not" standard of review enunciated in *County Court of Ulster County v. Allen,* 442 U.S. 140 (1979), a difficulty necessary if the Court interpreted the statute as creating a mandatory presumption, one which requires the jury to find the inferred fact upon proof of the underlying fact, unless the defendant has produced rebutting evidence. *Id.,* at 588-589.

Because of the Court of Criminal Appeals' reliance on *State v. Bryant,* 585 S.W.2d 586 (Tenn. 1979), it may be inferred that the court felt compelled to construe Tenn. Code Ann. § 39-1-804 as creating a permissive inference and not a mandatory presumption.

In *Bryant,* after holding that Tenn. Code Ann. § 39-2802 (currently § 39-2-704) created a permissive inference, the Tennessee Supreme Court, relying on *Sandstrom v. Montana,* 442 U.S. 510 (1979), held the instructions were inadequate because they did not make clear that the jury may, but need not, draw the inference suggested by the statute and were, therefore, susceptible to an interpretation that the jury must convict upon a showing of masked entry, absent rebuttal proof that there was no criminal intent. *State v. Bryant, supra,* at 589-590. Accordingly, the case was remanded for a new trial in which proper instructions were to be given. *Id.,* at 590.

In *Sandstrom,* the defendant was charged with "deliberate homicide," defined in the Montana statute as a criminal homicide committed "purposely or knowingly." Sandstrom admitted the homicide at his trial, but insisted that he did not commit the crime "purposely or knowingly." He argued that the jury instruction, "[t]he law presumes that

a person intends the ordinary consequences of his voluntary acts,'' had the effect of shifting the burden of proof to him on the issue of whether the defendant acted ''purposely or knowingly.'' *Id.*, at 512-513.

This Court said that the threshold inquiry in determining the constitutionality of such an instruction was to determine the nature of the presumption it described, which determination required:

> careful attention to the words actually spoken to the jury, see *Id.*, [*Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213 (1979)] at 157-159, n. 16, 99 S.Ct., at 2225, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.

Id., at 514.

In *Ulster*, the Court distinguished between the two types of evidentiary devices, the permissive inference and the mandatory presumption. The permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the State of the basic fact and places no burden of any kind on the defendant. The mandatory presumption tells the triers of fact that they must find the elemental fact upon proof of the basic fact unless the defendant comes forward with some evidence to rebut the presumed connection between the two facts. *County Court of Ulster County v. Allen*, 442 U.S. 140, 156-157 (1979).

In *Sandstrom*, this Court concluded that a reasonable jury could have interpreted the jury instruction "as a direction to find intent upon proof of the defendant's voluntary action (and their 'ordinary' consequences) unless the

defendant proved the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent." *Id.*, at 517. That conclusion was based upon the force of the words, "the law presumes," and the failure of the trial judge to instruct that the jury presumption could be rebutted.

In *Sandstrom,* this Court relied upon *In re Winship,* 397 U.S. 358 (1970) for "the appropriate mode of constitutional analysis" to be applied to the presumption presented for review in that case. *Id.*, at 519-520.

In *Winship* this Court held:

> [T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the *crime* with which he is charged.

Id., at 364 (emphasis added).

The petitioner submits that the case *sub judice* is distinguishable from *Sandstrom* because the jury instruction in this case is in regard to a sentencing status, not an element of a crime.

The Tennessee habitual criminal statutes do not create an independent crime, but instead define a status, prescribing the circumstances under which enhanced penalty is imposed. *Evans v. State,* 571 S.W.2d 283 (Tenn. 1978); *Pearson v. State,* 521 S.W.2d 225 (Tenn. 1975); *Harrison v. State,* 217 Tenn. 31, 394 S.W.2d 713 (1965); *State v. Duffel,* 665 S.W.2d 402 (Tenn. Crim. App. 1983); *State v. Wright,* 650 S.W.2d 57 (Tenn. Crim. App. 1983); *Meade v. State,* 484 S.W.2d 366 (Tenn. Crim. App. 1972); *Canupp v. State,* 3 Tenn. Crim. App. 249, 460 S.W.2d 382 (1970); *Frazier v. Davis,* 567 F.Supp. 4 (E.D. Tenn. 1982).

The State need not prove beyond a reasonable doubt a fact affecting the severity of punishment. *McMillan v. Pennsylvania,* — U.S. —, 106 S.Ct. 2411, 2416 (1986); *Patterson v. New York,* 432 U.S. 197 (1977).

Tenn. Code Ann § 39-1-804 can be construed to create a lawful mandatory presumption; therefore, the failure of the trial court to give instructions indicating the meaning and nature of the inference created by the statute as permissive was not unconstitutional.

—o—

CONCLUSION

For the reasons stated, the petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

JACKSON, MAY SESSION, 1986

STATE OF TENNESSEE,
Appellee

v.

LAMAR FLETCHER,
a/k/a LAMARR
FLETCHER,
Appellant

C.C.A. NO. 88
SHELBY COUNTY

HONORABLE
JOSEPH McCARTIE,
JUDGE

(Armed Robbery—two counts—Habitual Criminal)

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OPINION FILED: August 13, 1986

REMANDED FOR NEW HABITUAL
CRIMINAL PROCEEDING

Joe D. Duncan
Judge

OPINION

The defendant was convicted on two counts of armed robbery, and as to each offense he was found to be an habitual criminal. He was sentenced to serve two concurrent life sentences.

The defendant says the evidence does not support the convictions for armed robbery or the verdict that he is an habitual criminal. He also says the trial judge erroneously instructed the jury on the issue of identity in the habitual criminal proceeding.

The evidence shows three men forced their way into a home where a woman and her three sons lived. These men held guns on the occupants and took the woman's jewelry, cash, and television set. They also took jewelry from one of the sons.

The woman and one of the sons positively identified the defendant as one of the participants in the robbery. Other evidence circumstantially connected him to the crime.

The defendant did not testify but offered evidence from a man who had participated in the offense and who had pled guilty. He testified the defendant did not participate in the crime.

There was sufficient evidence from which the jury could find guilt beyond a reasonable doubt on the robbery offenses, which is the test we apply when the sufficiency of the evidence is raised on an appeal. T.R.A.P. 13(e).

The evidence in the habitual criminal phase of the trial consisted only of records introduced by the state that showed that a person of the same name as the defendant

had previously been convicted of a sufficient number of crimes to qualify him as an habitual criminal. The state offered no other evidence identifying the defendant as being the same person who was named in the records of the previous convictions.

The state relied upon the provisions of T.C.A. § 39-1-804, which states that the judicial records of prior convictions under the same name as the person on trial shall be "prima facie evidence" that the identity of such person is the same. The trial court instructed the jury on the provisions of this statute, but did not instruct the jury as to how to evaluate the permissive inference created by the statute.

The defendant argues that T.C.A. § 39-1-804 is unconstitutional, and that the trial court's instructions unconstitutionally shifted the burden of proof to him. In the alternative, he argues that the trial court failed to give proper instructions on the nature of the "prima facie" provision of the statute. We find merit to this second issue.

In *State v. Woodson,* 705 S.W.2d 677 (Tenn. Cr. App. 1985), our Court, relying on our Supreme Court's decisions in *State v. Bryant,* 585 S.W.2d 586 (Tenn. 1979), and *State v. Merriweather,* 625 S.W.2d 256 (Tenn. 1981), found nothing constitutionally infirm about T.C.A. § 39-1-804, and we held that the statute merely created a permissive inference and did not shift any burden of proof to the defendant.

In *Bryant,* our Supreme Court was concerned with T.C.A. § 39-2-704, which provides in pertinent part:

> If any person or persons, disguised or in mask, by day or by night, shall enter upon the premises of another, . . . it shall be considered prima facie that his or her intention is to commit a felony, ...

In that case, the Court construed the "prima facie" provision of that statute to create merely a "permissive inference," i.e., one that allows, but does not require, the jury to infer the presumed fact from the proved fact. We note that in *Bryant,* the Supreme Court reversed the defendant's conviction because proper instructions were not given to the jury concerning the "permissive inference." Similarly, our Supreme Court ruled in *Merriweather* that the "prima facie" and "presumption of intent" language in T.C.A. § 39-3-302 (bad check statute) was not fatal, pointing out that in *Bush v. State,* 541 S.W.2d 391 (Tenn. 1976), that Court noted that the terms "presumption" and "inference" have frequently been used interchangeably. Also, as in the *Bryant* case, the Court reversed Merriweather's conviction because the jury was not properly instructed.

We note that in *Woodson,* a complaint, like the one in the present case, was made that the trial court had failed to properly instruct the jury on the nature of the permissive inference created by T.C.A. § 39-1-804. However, we found in *Woodson* that this issue had been waived because the defendant had not objected to the charge, had not offered any special requests, and had not listed the complaint in his motion for a new trial.

The posture of the present case is unlike the situation in *Woodson* because in the present case the defendant did object to the charge as given and did list his complaint in his motion for new trial.

Thus, under the principles of *Merriweather* and *Bryant*, we conclude that the failure of the trial court to give proper instructions as to the meaning and nature of the permissive inference established by the statute was error, and a remand is required for a new hearing on the habitual criminal phase of the case. On retrial, the trial court will instruct the jury fully concerning the nature of the permissive inference created by the statute.

This case is remanded for a new trial only on the habitual criminal phase of the trial.

/s/ Joe D. Duncan
Judge

CONCUR:
/s/ Mark A. Walker,
Presiding Judge

(SEE DISSENTING OPINION)
John K. Byers, Judge

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE

JACKSON, MAY SESSION, 1986

STATE OF TENNESSEE,

Appellee C.C.A. NO. 88

v. SHELBY COUNTY

LAMAR FLETCHER, a/k/a
LAMARR FLETCHER,

Appellant

DISSENTING OPINION

(Filed August 13, 1986)

I am unable to agree with the majority opinion which holds the instruction by the trial court that judicial records of prior convictions by a person of the same name as the defendant is prima facie evidence of the defendant's prior convictions unconstitutionally shifts the burden of proof to the defendant.

The cases relied upon by the majority all derive from *Mullaney v. Wilber*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and deal with the impermissible shifting of the burden of proof from the state to an accused in prosecutions for criminal offenses. It is settled, without question, that in a criminal prosecution the state is required to prove all the essential elements of the crime, including identity of the accused as the perpetrator thereof, and the state may not be relieved of this burden by any presumption which the defendant must present evidence to refute.

A proceeding to determine if an accused has become an habitual criminal is not a prosecution of a criminal offense. It is a proceeding to determine whether the defendant has a criminal record sufficient to require enhanced punishment, and I am of the opinion the full panoply of constitutional rights does not attach in such a proceeding. Our courts have held consistently that the habitual criminal statute did not create an independent crime, but serves to enhance the punishment for a person who has become an habitual criminal, *Evans v. State*, 571 S.W.2d 283 (Tenn. 1978), and provides enhanced punishment for a person who has become a public menace as defined in the Act, *State v. Wright*, 650 S.W.2d 57

(Tenn. Cr. App. 1983), and defines a status prescribing circumstances under which there is an enhanced penalty for the triggering offense. *State v. Duffel*, 665 S.W.2d 402 (Tenn. Cr. App. 1983).

I am satisfied that the constitutional rights which attach to an accused in this procedure include the right to have notice of the intent to enhance the punishment and the basis for it, the right to appear in person and by counsel, the right to confront witnesses who testify, and the right to offer evidence on his own behalf. *See Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954).

I am unable to find any state or federal constitutional right to trial by jury on the habitual criminal phase of the trial. Our highest courts have held that the guarantees of trial by jury do not encompass the sentencing function. See *Hunter v. State*, 496 S.W.2d 900 (Tenn. 1972), and *Spaziano v. Florida*, 104 S.Ct. 3154 (1984). Except for the language in T.C.A. § 39-1-805 which provides the trial judge shall "inquire of the jury as to whether they find the defendant guilty both of the felony charge and also as an habitual criminal [and shall] record the verdict of the jury and enter judgment accordingly," I find no statutory requirement for a jury in the habitual criminal phase of the proceeding, and I suggest this is more from custom rather than legislative intent.

The right to trial by jury on the habitual criminal charge, as far as I can determine, was obliquely noticed in the case of *McCummings v. State*, 175 Tenn. 309, 134 S.W. 2d 151 (1939), where the Court observed, "Under section

6 of the Act the question as to whether the defendant is a habitual criminal is one for the jury to decide." This section of the Public Act that initiated the habitual criminal prosecutions in this state contemplated a unified trial of the triggering offense and of the habitual criminal phase.

The provisions existed prior to the decision of our Supreme Court in *Harrison v. State*, 394 S.W.2d 713 (Tenn. 1965), which put an end to a unitary trial on the triggering offense and the charge of being a habitual criminal. The Court there established the bifurcated procedure wherein a verdict of guilt on the triggering offense, in a proceeding wherein the evidence of previous crimes were not permitted into evidence, is required before proceeding to the habitual criminal charge is allowed. Thus, the inquiry of the jury as required by T.C.A. § 39-1-805 has no independent meaning and in my view gives no statutory support to the right to trial by jury in that phase of the proceeding.

Jury sentencing in these cases is more probably retained out of custom. *See* T.C.A. § 40-35-203(d). But the fact that we customarily use a jury and proceed on the enhancement by indictment does not make the habitual criminal hearing the equivalent of a trial for all purposes.

Furthermore, the Supreme Court has recently pointed out there is no constitutionally prescribed burden of proof in a sentencing proceeding. In *McMillan v. Pennsylvania*, 39 Cr.L. 3161 (U.S. 1986), the Court declined to apply the *Mullaney* analysis to fact-finding in a sentencing context

and reiterated that it is "within the power of the State to regulate . . . the burden of producing evidence and the burden of persuasion." *Id.* at 3163.

The case involved a mandatory minimum sentence to be imposed by the trial court after a post-trial finding that the defendant possessed a weapon when he committed the crime. The crucial distinction between *Mullaney* and *McMillan* was that possession of a weapon was not, and had not historically been, an element of the underlying felony. Where the state had met its burden of proof on the elements of the crime and the jury had convicted the defendant, the sentencing court was free to proceed on the enhancement. In the case before us, no one suggests that Fletcher's criminal record was an element of the triggering offense.

In *McMillan* the Court also noted with approval that the preponderance standard set out in the federal "dangerous special offender" statute has been uniformly upheld. *Id.* at 3165. That statute, like our own, may result in a prison term in excess of that available on the triggering offense, and it also makes a copy of the former judgment of conviction "prima facie evidence of such former judgment." 18 U.S.C. § 3575.

For these reasons and within the limits of fundamental due process set out in *Specht, supra,* the state is free to allocate some burden of persuasion to the defendant in a sentencing procedure. If the statute as written or the instruction given in this case has the effect of requiring some refutation from the defendant, I do not think this effect is forbidden by the *Mullaney* line of cases, and when we

apply those decisions to sentencing, we are transposing a constitutional rule onto a matter that is not of constitutional proportion.

Although our Sentencing Reform Act requires a finding the accused is the person who committed previous offenses beyond a reasonable doubt in another enhancement context, T.C.A. §§ 40-35-106(c), such rule does not affect the method of proof on such issue but only defines the quantum thereof.

I would hold the instruction is not erroneous and affirm the judgment in this case.

/s/ John K. Byers
Judge

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,

APPELLANT

VS.

SHELBY
CRIMINAL

C.C.A. NO. 88

LAMAR FLETCHER, a/k/a
LAMARR FLETCHER,

APPELLEE

ORDER

(Filed September 29, 1986)

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of the State of Tennessee is denied at cost of appellant.

PER CURIAM